

CIVIL SERVICE

CIVIL SERVICE COMMISSION

Appeals, Discipline and Separations

Remedies

Proposed Amendment: N.J.A.C. 4A:2-1.5

Authorized By: Civil Service Commission, Robert M. Czech, Chair/CEO.

Authority: N.J.S.A. 11A:2-6 and 11A:2-22; and P.L. 2008, c. 29.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2011-209.

A public hearing concerning the proposal will be held on:

Tuesday, October 18, 2011 at 3:00 P.M.

Civil Service Commission Room

44 South Clinton Avenue

Trenton, New Jersey

Please call Elizabeth Rosenthal at (609) 984-7140 if you wish to be included on the list of speakers.

Submit written comments by November 18, 2011 to:

Henry Maurer, Director

Merit System Practices and Labor Relations

Civil Service Commission

P.O. Box 312

Trenton, New Jersey 08625-0312

The agency proposal follows:

Summary

The Civil Service Commission finds that a rule amendment is needed following the court decision in *In the Matter of Hearn*, 417 N.J.Super. 289 (App. Div. 2010). In *Hearn*, the Commission had denied counsel fees to an unclassified State employee after it overturned his demotion, imposed following a discrimination investigation, since unclassified employees cannot file disciplinary appeals under civil service rules; therefore, an award of counsel fees was appropriate only where “sufficient cause” in the form of bad faith or invidious motivation were shown on the part of the appointing authority. The court held that the appointing authority in this case, the Department of Education, had explicitly referred to its action as “disciplinary,” so that the Commission’s denial of counsel fees on the basis that it was not disciplinary was not justified. Even if this were not a disciplinary appeal, however, the court faulted the Commission for only allowing a counsel fee award under N.J.A.C. 4A:2-1.5(b) in cases of bad faith or invidious motivation of the employer. Such a limitation, the court held, could only be done by rulemaking, not by adjudication.

The proposed amendment to N.J.A.C. 4A:2-1.5(b) would address the deficiency in the rule by explicitly allowing a finding of “sufficient cause” based on a

demonstration by the employee that the adverse action taken was done in bad faith or with invidious motivation by the appointing authority.

The Commission further proposes amending N.J.A.C. 4A:2-1.5(b) to reflect the changes to civil service law in P.L. 2008, c. 29, in which the Department of Personnel and the Merit System Board were abolished and replaced with the Civil Service Commission, a State agency in but not of the Department of Labor and Workforce Development. Therefore, references to the Commissioner of Personnel and the Merit System Board are proposed for replacement by references to the Civil Service Commission.

As the Commission has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The Civil Service Commission anticipates a positive social impact to result from the proposed amendment. Presently, N.J.A.C. 4A:2-1.5(b) does not permit an award of back pay, benefits and counsel fees in appeals not involving discipline or a layoff action effected in bad faith, unless one of two circumstances are evident: the appointing authority has unreasonably failed or delayed carrying out an order of the Commission or the Commission is able to find sufficient cause based on the facts of a case. The proposed amendment would define sufficient cause in the way it was presented in the *Hearn* matter: the employee demonstrates that the appointing authority took adverse action against him or her in bad faith or with invidious

motivation. The Commission sees this clear definition of “sufficient cause” as beneficial to appellants in matters not involving discipline or layoff-bad faith, as such appellants would have advance notice of the criteria they must satisfy in order to receive appropriate remedies.

Economic Impact

Because the proposed amendment to N.J.A.C. 4A:2-1.5(b) would clearly define “sufficient cause” for awarding back pay, benefits and counsel fees in appeals other than disciplinary or layoff-bad faith matters, an appellant would have a greater opportunity to try to satisfy the criteria for receiving such remedies. Additionally, due to the parameters that the rule amendment would provide, an appointing authority would also have an opportunity to defend against allegations of bad faith or invidious motivation and try to minimize the awarding of taxpayer dollars where the employer believes it is not warranted.

Federal Standards Statement

A Federal standards analysis is not required because the proposed amendment pertains to remedies in New Jersey civil service appeals and is not subject to any Federal standards or requirements.

Jobs Impact

It is not anticipated that the proposed amendment would cause the generation or loss of jobs. The proposed amendment pertains to remedies in civil service appeals.

Agriculture Industry Impact

It is not anticipated that the proposed amendment would have any agriculture industry impact. The proposed amendment pertains to remedies in civil service appeals.

Regulatory Flexibility Statement

A regulatory flexibility analysis is not required since the proposed amendment would have no effect on small businesses as defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed amendment would govern the criteria for an appellant's receipt of back pay, benefits or counsel fees in certain civil service appeals in the civil service of State and local government.

Smart Growth Impact

It is not anticipated that the proposed amendment would have any impact on the achievement of smart growth and the implementation of the State Development and Redevelopment Plan as defined under Executive Order No. 4 (2002).

Housing Affordability Impact Analysis

Since it concerns criteria for an appellant's receipt of back pay, benefits or counsel fees in certain civil service appeals, the proposed amendment would have no impact on the number of housing units or the average cost of housing in New Jersey.

Smart Growth Development Impact Analysis

Since it concerns criteria for an appellant's receipt of back pay, benefits or counsel fees in certain civil service appeals, the proposed amendment would have no

impact on new construction within Planning Areas 1 and 2, or within designated centers, under the State Development and Redevelopment Plan.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 1. APPEALS

4A:2-1.5 Remedies

(a) Seniority credit may be awarded in any successful appeal.

(b) Back pay, benefits and counsel fees may be awarded in disciplinary appeals and where a layoff action has been in bad faith. See N.J.A.C. 4A:2-2.10. In all other appeals, such relief may be granted where the appointing authority has unreasonably failed or delayed to carry out an order of the [Commissioner or Board] **Civil Service Commission** or where the [Board] **Commission** finds sufficient cause based on the particular case. **A finding of sufficient cause may be made where the employee demonstrates that the appointing authority took adverse action against the employee in bad faith or with invidious motivation.**